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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91214782
Party	Plaintiff Skullcandy, Inc.
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Attachments	SKULLCANDYS RESPONSE TO APPLICANTS MOTION TO DISMISS UNDER RULE 12(b)(6).pdf(36072 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Skullcandy, Inc., Opposer, v. Subjekt LLC, Applicant.	Opposition No.: 91214782 Mark: Design Only U.S. Serial No.: 85/884,443
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**SKULLCANDY’S RESPONSE TO APPLICANT’S MOTION TO
DISMISS UNDER RULE 12(b)(6)**

INTRODUCTION

Subjekt LLC (“Applicant”) filed a motion to dismiss Opposition Proceeding No. 91214782 on March 17, 2014 (“the Motion”) in lieu of filing an Answer. The Motion alleges that Skullcandy, Inc. (“Opposer”) failed to plead sufficient facts to demonstrate standing and failed to establish “a cause of action for likelihood of confusion.” Applicant’s motion is without merit and should be denied.

ARGUMENT

1. The Relevant Legal Standards

In order to withstand a motion to dismiss, an Opposer need only allege such facts which, if proved, would establish that the Opposer is entitled to the relief sought; that is, (1) opposer has standing to bring the proceeding, and (2) a valid statutory ground exists for opposing the registration. *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). Specifically, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A claim is plausible on its face when the opposer pleads factual content that if proved, would allow the Board to conclude, or draw a reasonable inference that, the opposer has standing and that a valid ground for opposition exists. *See Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011) (citations omitted).

2. Opposer's Allegations Are Sufficient, If Proved, to Demonstrate Opposer's Standing To Challenge the Application

Applicant states that “[o]pposer has not plead any facts to show its standing to bring the Opposition” and “has merely plead legal conclusions without any facts to support them.” (Motion at pp. 2-3.)

On the contrary, the Notice of Opposition alleges facts that, if proved, establish Opposer's standing and real interest in the proceeding. (*See* Notice of Opposition at ¶¶ 1-6) (alleging continuous and extensive use in U.S. interstate commerce of the Skull Design mark for various goods and services, extensive investment in the mark, common law and registered trademark rights in the Skull Design mark, prior rights in the Skull Design mark, and Opposer's belief that it will be damaged by registration of the opposed application). Moreover, the Notice of Opposition identifies the parties' design marks, alleges that the marks are confusingly similar, identifies the parties' goods and alleges that they are identical or closely related, and upon information and belief asserts that the purchasers for the parties' goods are overlapping. (*Id.* at ¶¶ 1, 5-8.) There is no issue regarding Opposer's standing.

3. Opposer Alleges Facts That, If Proved, Establish a Valid Statutory Ground for the Opposition

Applicant also makes the inaccurate and overbroad statements that “Opposer has not pleaded *any* factual matter at all . . .” and “has also failed to plead any facts whatsoever . . .” relating to a cause of action. (Motion at pp. 2, 3) (emphasis in original). Contrary to Applicant's position, an opposer need not set forth its analyses and application of the *DuPont* factors in the Notice of Opposition. *See* 37 CFR § 2.104 (requiring a “short and plain statement” showing why the opposer believes it would be damaged by the registration of the opposed mark and state the grounds for the opposition).

Opposer has stated sufficient facts and a valid statutory ground for relief as set forth in the Notice of Opposition at ¶¶ 1-8, which identify the Opposer's rights in and to the Skull Design mark, identify Applicant's confusingly similar mark, recite the parties' goods and state that the parties' goods are identical and closely related, and assert an overlap of consumers. Based on these asserted facts, Opposer alleges prior rights, confusing similarity, confusion as to source and consumer confusion, deception to the trade and public who would mistakenly believe the applied-for goods originate with, are approved, sponsored or endorsed by, or have some connection or affiliation with Opposer, all to Opposer's damage under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

CONCLUSION

For the foregoing reasons, Opposer respectfully requests that Applicant's motion be denied.

Respectfully submitted,

SKULLCANDY, INC.

Dated: 4/7/2014

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **SKULLCANDY'S RESPONSE TO APPLICANT'S MOTION TO DISMISS UNDER RULE 12(b)(6)** was served on counsel for Applicant at the following address by U.S. mail, postage prepaid, on this 7th day of April 2014.

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_____/Andrew J. Avsec/